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THE COMMON CARRIER CONCEPT AS APPLIED TO TELECOMMUNICATIONS: AN HISTORICAL PERSPECTIVE

SUMMARY

The common carrier provisions of the Communications Act of 1934 are applicable to communications entities that function as "common carriers." Since the term is not defined in the Act, except by repeated reference to common carriage, it is necessary to look to antecedent legislative and judicial developments to gain an understanding of the scope of the common carrier concept as applied to telecommunciations.

At common law the common carrier concept was employed in two distinct contexts. It was the means by which strict liability was imposed on carriers of goods who held themselves out to serve members of the public. It also was one of the means by which obligations were imposed upon businesses with special franchises or monopoly positions,requiring them to serve members of the public on reasonable and nondiscriminatory terms. The first purpose has no relevance to the regualtion of telecommunciations and the emphasis on "holding out" to serve the public is misplaced in the context of telecommunications. The critical question is whether the telecommunciations entity has monopoly power or special franchises, necessitating government regulation in order to protect the public against monopoly abuse.

The history of telecommunications regulation appears largely in the statutes of the states and of the Congress. In the initial period, from 1845 to 1879, the dominant theme of such legislation was to grant to telegraph companies special privileges -- to use public roads, to exercise the power of eminent domain, and to use the corporate form of doing business -- and at the same time to impose upon them obligations to provide reasonable and nondiscriminatory service to the public. Early Congressional legislation, in the period 1860-1888, followed a similar pattern. Later telecommunications legislation, following the introduction of the telephone in 1878, imposed regulatory restrictions on the new medium in much the same manner as the earlier telegraph legislation. The emphasis was on requiring reasonable and nondiscriminatory service by monopoly enterprises.

The early telecommunications litigation reached results consistent with the statutes. The common law, as well as applicable legislation, was invoked to strike down discriminatory or exclusionary practices by franchised monopolists, and other measures regulating telecommunications firms were sustained. There was some confusion over the responsibility of telegraph companies for omissions, errors and delays; some courts attempted to impose standards of strict liability, relying on the law applicable to the common carrier's custody of goods. But the analogy was not appropriate, and ultimately a more satisfactory solution was reached by treating the telegraph company as a franchised monopolist.

Toward the end of the nineteeth century, the regulation of telecommunications began to be entrusted to state regulatory commissions. By 1920, such commissions regulated telecommunications in all states but three. At the federal level, the Interstate Commerce Commission was empowered to regulate telephone and telegraph as common carriers in 1910. The authority was transferred to the Federal Communications Commission in the Communciations Act of 1934. In all of this legislation, the manifest purpose was to subject to public surveillance the operations of monopoly telecommunciations firms.

It is consistent with this history, as well as with the purposes of the Communciations Act itself, to limit the common carrier provisions of the Communications Act to monopoly communications enterprises. Nothing in the history of the regulation of telecommunications or of the Act suggests an intent to impose common carrier regulation on communications enterprises subject to the discipline of the competitive marketplace.

INTRODUCTION

The Communications Act of 1934, in Title II pertaining to common carriers, confers extensive authority on the FCC to regulate the rates and business practices of communications entities classified as common carriers.[1/] The Act defines a "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign radio transmission of energy . . . ."[2/] The only legislative history bearing directly on this definition asserts that it was not intended to include "any person if not a common carrier in the ordinary sense of the term."[3/] Thus, both the language and the legislative history of the 1934 enactment make necessary an inquiry into the antecedent understanding of the scope of the common carrier concept as applied to telecommunications.

This inquiry is more sharply focused by another aspect of the 1934 legislation. In its common carrier provisions the statute was in large measure a reenactment of earlier federal legislation regulating telecommunications common carriers -- the Mann-Elkins Act of 1910.[4/] In the

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1/ 48 Stat. 1064, 1070 (1934), as amended, 47 U.S.C. § 201 *et seq*.

2/ 47 U.S.C. § 153(h).

3/ H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 46 (1934).

4/ Act of June 18, 1910, 36 Stat. 539. On the intention to reenact the 1910 legislation in 1934 without substantial

[Footnote continued next page]

absence of Congressional intent to expand the general scope of common carrier regulation in 1934, it is particularly pertinent to consider the understanding of the common carrier concept as it had developed prior to 1910.

Recent telecommunications decisions have defined a common carrier as one that holds itself out to serve members of the public indiscriminately.[5/] In the context of telecommunications, this approach does not adequately identify important aspects of the common carrier concept. A review of the common law precedents, and of the extensive state and federal legislation that antedated the Mann-Elkins Act of 1910 and the Communications Act of 1934, reveals that another factor was of controlling significance. The basis for regulating telecommunications entities as common carriers was their possession of special franchises or monopoly positions. There is no basis for extending the common carrier concept to encompass communications entities that do not possess special franchises or monopoly power.

[Footnote continued from preceding page]

modification, _see_ Sen. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934); House Rep. No. 1850, 73d Cong., 2d Sess. 5 (1934).

5/ _See_ _NARUC v. FCC_, 525 F.2d 630, 641 (D.C. Cir.), _cert. denied_, 425 U.S. 992 (1976); _NARUC v. FCC_, 533 F.2d 601, 608 (D.C. Cir. 1976); _AT&T v. FCC_, 572 F.2d 17, 24 (2d Cir.), _cert. denied_, 439 U.S. 875 (1978). _See also_ _FCC v. Midwest Video Corp._, 440 U.S. 689 (1979).

I. THE COMMON LAW BACKGROUND

Common law doctrines applicable to common carriers have two distinct sources. The first is an aspect of the law of bailments and is concerned with the responsibilities of carriers for goods in their possession. The second is an aspect of the law of franchises and is concerned with government control of enterprises exercising exclusive privileges. There are some features in common, but the underlying policy considerations are quite different. In determining the responsibility of a carrier for goods in its possession, the critical question is the nature of the carrier's undertaking: Did it hold itself out as a general carrier of such goods? In determining the proper scope of government regulation of a carrier, the important question is whether the carrier is in a position to control the flow of traffic because of special privileges or monopoly power.

A. Common Carriers and the Law of Bailments

Beginning at least as early as the decision in *Morse v. Slue* (1672),[6/] the English courts imposed upon common carriers distinctive responsibilities for goods in their

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6/ 1 Vent. 190, 238, 86 Eng. Rep. 129, 159 (24 and 25 Car. II, 1672). There are earlier decisions supporting the concept of special responsibility, but they do not provide so unambiguous an articulation. *See*, *e.g.*, *Rich v. Kneeland*, Cro. Jac. 330, 79 Eng. Rep. 282 (11 Jac. 1, 1613).

possession. They were held to be insurers, responsible for the safe delivery of goods entrusted to them, absent intervention by act of God or the King's enemies. The doctrine was designed to protect shippers against breaches of trust on the part of carriers. As stated in the leading case of Coggs v. Bernard (1703),[7/] the rule is

> "contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else the carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., yet doing it in such a clandestine manner, as would not be possible to be discovered."

A similar theme was articulated in Forward v. Pittard (1785),[8/] where a common carrier by wagon was held responsible, in the absence of negligence, for the loss of goods in a fire.

> "[T]o prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies or by such act as could not happen by the intervention of man, as storm, lightening, and tempests . . . [The carrier is not excused in the event of robbery] for fear

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7/ 2 Ld. Raym. 909, 918, 92 Eng. Rep. 107, 112 (1703).

8/ 1 T.R. 27, 33, 99 Eng. Rep. 953, 956-57 (1785). See also Dale v. Hall, 1 Wils. K.B. 281, 95 Eng. Rep. 619 (1750); Hyde v. Navigation Co., 5 T.R. 389, 101 Eng. Rep. 218 (1793).

> it may give room for collusion, that the [carrier] may contrive to be robbed on purpose, and share the spoil."

It also was asserted that the rule of strict liability had a tendency to make carriers more careful.[9/]

These peculiar responsibilities of common carriers appear not to be related to any concept of monopoly. Neither the facts nor the reasoning of the leading cases suggest that common carriers generally, or the particular carriers before the courts, possessed monopoly power. Indeed, there is a strong indication to the contrary, for as early as Morse v. Slue,[10/] and consistently thereafter,[11/] the English courts permitted common carriers to revise the terms of their responsibilities by special contracts with shippers. If monopoly were the basis of the carrier's special responsibilities, it would be inconsistent with the policy of the law to allow the carrier to avoid its responsibilities in this manner, at least in the absence of close scrutiny.

9/ Proprietors of Trent Navigation v. Ward, 3 Esp. 127, 131, 170 Eng. Rep. 562, 563 (1785).

10/ The court noted that "if the [carrier] would, he might have made a caution for himself, which he omitting and taking in the goods generally, he shall answer for what happens." Morse v. Slue, 1 Vent. 238, 86 Eng. Rep. 159 (24 & 25 Car. II, 1672).

11/ See, e.g., Riley v. Horne, 5 Bing. 217, 130 Eng. Rep. 1044 (1828).

Furthermore, this branch of the law of common carriers was concerned almost exclusively with bailments (the custody of goods). While there is dicta concerning the common carrier's duty to serve, and to charge a reasonable price, these almost invariably were steps in judicial reasoning designed to establish a consideration for the carrier's responsibility (the shipper's duty to pay)[12/] or a justification for contracts providing exemptions from strict liability (the shipper's right to obtain service free of the contractual exemption on demand).[13/] The reported cases disclose no instances of litigation concerned with the reasonableness of a carrier's rates, and only one instance of a suit for refusal to serve.[14/] Writing in 1879 on Common Carriers and the Common Law, Oliver Wendell Holmes considered the sole issue to be the responsibilities of carriers for the safe delivery of goods in their possession.[15/]

12/ Bastard v. Bastard, 2 Show. K.B. 81, 89 Eng. Rep. 807 (31 Chas. II, 1679).

13/ Harris v. Packwood, 3 Taunt. 264, 128 Eng. Rep. 105 (1810).

14/ Jackson v. Rogers, 2 Show. K.B. 327, 89 Eng. Rep. 968 (35 Chas. II, 1685).

15/ O. W. Holmes, Common Carriers and the Common Law, 13 Am. L. Rev. 40 (1879). Substantially the same discussion is included in O. W. Holmes, The Common Law 180-205 (1881). See also Burdick, The Origin of the Peculiar Duties of Public Service Corporations, 11 Colum. L. Rev. 515, 616, 743 (1911).

B. Common Carriers and the Law of Franchises

The second source of the law of common carriers originates in the writings of Sir Matthew Hale. In De Portibus Maris, written about 1670 and published in 1787, Lord Hale distinguished between private and public wharves and cranes:16/

> "A man for his own private advantage may in a port town set up a wharf or crane, and take what rates he and his customers can agree for cranage, wharfage, [etc.;] for he doth no more than is lawful for any man to do, viz, makes the most of his own . . . But such wharfs cannot receive customable goods against the provision of the statute of 1 Eliz. cap. II.
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> "If the king or a subject have a publick wharf, unto which all persons that come and unlade or lade their goods for the purpose, because they are wharfs only licensed by the queen, according to the statute of 1 El. cap. II, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, [etc.,] neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be juris privati only . . .
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> "But in that case the king may limit by his charter and license him to take reasonable tolls, though it be a new port or wharf, and made publick; because he is to be at

16/ Hargrave Law Tracts 77-78 (1787). See McCallister, Lord Hale and Business Affected With a Public Interest, 43 Harv. L. Rev. 759 (1930).

> the charge to maintain and repair it, and find those conveniences that are fit for it, as cranes and weights."

The position of Lord Hale found support in ancient common law doctrines recognizing the special status and responsibilities of ferries,[17/] and was applied by the English courts in two cases involving port facilities. In Bolt v. Stennet (1800),[18/] the licensed owner of a crane in a port sued defendant for using the crane without permission. Defendant's justification -- that the crane was necessary to land goods and that he had a right to use it on payment of reasonable compensation -- was accepted as proper. In Allnut v. Inglis (1810),[19/] defendant had the only warehouse in London in which plaintiff's wine could be stored free of duty. Plaintiff refused to pay defendant's storage fee and, as a consequence, was compelled to pay duty. In a suit to recover damages, plaintiff prevailed when defendant declined to contest plaintiff's claim that it had tendered reasonable compensation for the storage requested. Because defendant had a monopoly, it was limited to a reasonable rate:

17/ See 3 W. Blackstone, Commentaries on the Law of England 219 (3d ed. 1770).

18/ 8 T.R. 606, 101 Eng. Rep. 1572 (1800).

19/ 12 East. 527, 104 Eng. Rep. 206 (1810).

> "[I]f, for a particular purpose, the public have a right to resort to [the warehouseman's] premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms. [According to Lord Hale,] whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, . . . he is confined to take reasonable compensation only for the use of the wharf."[20/]

That there were two separate sources of common carrier responsibilities is supported by the separate attention given to each by the leading treatise writers of the nineteenth century. James Kent, in his Commentaries on American Law (1848),[21/] discussed separately the rights and obligations of holders of franchises[22/] and the responsibilities of common carriers for goods in their possession.[23/] The source of subsequent confusion is suggested by Kent's Commentaries, for the railroads -- the most important business enterprises of the nineteenth century -- were discussed under both headings.

20/ 12 East. at 538-39, 104 Eng. Rep. at 210-11 (Lord Ellenborough).

21/ This was the sixth edition, the last one edited by Kent. See Dorfman, Chancellor Kent and the Developing American Economy, 61 Colum. L. Rev. 1290 (1961).

22/ Vol. 3 at 458-59.

23/ Vol. 2 at 597-99.

II. EARLY TELEGRAPH LEGISLATION IN THE STATES: 1845-1879

Principles of telecommunications regulation were first expressed in state statutes passed in response to the invention of the telegraph. The structure and timing of the early statutes leave little doubt that they were premised on the franchise theory of regulation articulated by Lord Hale.

To function effectively, telegraph companies needed legislative authorization to use public thoroughfares. In many instances the right to traverse private property also was important. Finally, the power to proceed as a corporation was of value in facilitating the aggregation of necessary capital. The early state legislation granted one or more of these privileges and, in recognition of the favored position conferred, exacted obligations in return. Even when the statutes were silent on the responsibilities of telegraph companies, the courts often implied obligations on the basis of the special privileges conferred. State legislation also was influenced by the patent monopoly granted to Morse. The most general pattern was the grant of special privileges (use of public roads, eminent domain, incorporation) joined with the requirement that the company serve all customers, including other telegraph lines, without discrimination -- a mode of regulation appropriate to guard against monopoly abuse.

A. New York

As an important commercial center, New York exerted a substantial influence on early patterns of state legislation. In 1845, New York enacted that:

> "The proprietors of the patent right of Morse's electromagnetic telegraph may be and hereby are authorized to construct lines of said telegraph from point to point and across any of the waters within the limits of this state, by the erection of posts, piers or butments for sustaining the wires of the same: Provided that the same shall not in any instance be so constructed as to endanger or injuriously interrupt the navigation of such waters; and provided also, that the private rights of individuals shall be in no wise impaired by the provisions of this act . . . ."[24/]

Three years later, in 1848, New York adopted the first comprehensive telegraph legislation: "An act to provide for the incorporation and regulation of telegraph companies."[25/] The first three sections of the act were concerned with the prerequisites for incorporation, requiring among other things a description of the "general route of the line of telegraph, designating the points to be connected." Section 4 conferred the normal legal powers on the corporation, including the power to "make such prudential rules, regulations

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24/ Act of May 13, 1845, N.Y. Laws, c. 243, p. 264.

25/ Act of April 12, 1848, N.Y. Laws, c. 265, p. 392.

and by-laws, as may be necessary in the transaction of their business, not inconsistent with the laws of this state or of the United States."

Section 5 permitted construction of the telegraph line "along and upon any of the public roads and highways, or across any of the waters within the limits of this state, by the erection of the necessary fixtures, . . . provided the same shall not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said waters . . . ." Section 6 prescribed procedures by which landowners would be compensated for the use of their lands by the telegraph company, implicitly conferring the equivalent of the power of eminent domain.

The regulatory provisions of the statute were included in sections 11 and 12. They required service to all customers, including other telegraph companies, on a nondiscriminatory basis:

> "§11. It shall be the duty of the owner or the association owning any telegraph line, doing business within this state, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under penalty of one hundred dollars for every neglect or refusal so to do . . . .[26]

26/ Section 11 was amended in 1855 to add the following: "provided that nothing contained in this section shall be

[Footnote continued next page]

"§12. It shall likewise be the duty of every such owner or association, to transmit all dispatches in the order in which they are received, under the like penalty of one hundred dollars . . . provided, however, that arrangements may be made . . . for the transmission of [newspaper dispatches] out of [their] regular order."

An 1850 statute added the provision:

"Any person connected with a telegraph company . . . who shall willfully divulge the contents, or the nature of the contents, of any private communication entrusted to him for transmission or delivery, or who shall willfully refuse or neglect to transmit or deliver the same, [shall be adjudged guilty of a misdemeanor.]"27/

In 1851, telegraph companies were authorized to extend their lines, to construct branch lines, and to unite with other incorporated telegraph companies.28/

[Footnote continued from preceding page]

construed to require any telegraph company or association to receive and transmit dispatches from or for any other company or association, owning a line of telegraph parallel with or doing business in competition with the line over which the dispatch is required to be sent." Act of April 19, 1855, N.Y. Laws, c. 559, p. 1967.

27/ Act of April 10, 1850, N.Y. Laws, c. 340, p. 739.

28/ Act of April 22, 1851, N.Y. Laws, c. 98, p. 178. Other amendments were made by Act of June 29, 1853, N.Y. Laws, c. 471, p. 931 (various aspects, including eminent domain); Act of April 22, 1862, N.Y. Laws, c. 425, p. 761 (broadening authority to extend lines and acquire other companies); Act of May 9, 1867, N.Y. Laws, c. 871, p. 2186 (concerned with improper access to telegrams); Act of May 2, 1970, N.Y. Laws,

[Footnote continued next page]

B. Replication of the New York Model

In 1847, Virginia provided that any person, satisfying the board of public works of its right to use the invention, could construct telegraph lines along public roads with the consent of local authorities. A penalty was imposed on any telegraph agent "who may, from corrupt or improper motives, withhold or delay the transmission of messages or intelligence, for which the customary charges have been paid or tendered."29/ An 1849 codification of prior legislation referred to the power of telegraph companies to "make reasonable charges on [telegraph] messages."30/ A more

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c. 568, p. 1327 (concerned with transfers of telegraph franchises and properties); Act of May 14, 1875, N.Y. Laws, c. 319 (concerned with changes in routes); Act of May 27, 1879, N.Y. Laws, c. 377, p. 444 (reiterating duty to transmit in terms similar to sec. 11 of the 1848 statute); Act of May 28, 1879, N.Y. Laws, c. 397, p. 460 (concerned with underground construction of telegraph lines).

29/ Act of Mar. 20, 1847, Va. Laws, 1846, c. 92, p. 79 §§ 3,4. The act authorized telegraph operations by specific companies, specifying "reasonable charges" on messages transmitted. §§ 1, 2. Other acts of specific incorporation include Act of Mar. 6, 1847, Va. Laws, 1846, c. 99, p. 85 (no rate standard); Act of Mar. 17, 1849, Va. Laws, 1848-49, c. 197, p. 138 (specific rate standard); Act of Mar. 12, 1849, Va. Laws, 1848-49, c. 200, p. 142 (reference to reasonable rates). *See also* the Act of Mar. 31, 1848, Va. Laws, 1847-48, c. 123, p. 167, requiring telegraph companies to make annual reports to the board of public works, giving financial data and "regulations adopted to ensure the faithful discharge of the duties undertaken . . . ."

30/ Va. Code, ch. 65, sec. 1 (1849).

comprehensive statute, similar to that of New York, was enacted in 1852.[31] The reference to reasonable charges was carried forward in subsequent codifications.[32]

Michigan in 1847 authorized persons and companies to construct telegraph lines on public roads, but permitted intrusions on private lands only with the consent of the property owner. It was further provided that at each telegraph office "communications received . . . shall have precedence in the order in which they are received, and may be communicated accordingly."[33] In 1851, a comprehensive telegraph statute was enacted, authorizing the incorporation of telegraph companies, the use of public thoroughfares for telegraph lines, and the use of private lands for the same purpose on payment of compensation to the owners. The regulatory features of the New York legislation of 1848 and 1850 were included.[34]

31/ Act of May 26, 1852, Va. Laws, c. 149, p. 121, amended in minor respects, Va. Laws, 1853-54, c. 45, p. 32. The Act of Feb. 21, 1866, Va. Laws, 1865-66, c. 43, p. 218, reiterated the duty to transmit and to deliver with emphasis on promptness.

32/ Va. Code, ch. 65, sec. 1 (1860); Va. Code, ch. 65, sec. 1 (1873).

33/ Act of Jan. 28, 1847, Mich. Laws, No. 4, p. 4, and Act of Mar. 5, 1847, Mich. Laws, 1847, p. 41, as amended by Act of Jan. 24, 1849, Mich. Laws, No. 10, p. 7.

34/ Act of Mar. 26, 1851, Mich. Laws, No. 59, p. 61, supplemented by Act of Feb. 12, 1853, No. 68, p. 112. Subsequent amendments of limited significance: Act of Mar. 20,

[Footnote continued next page]

Connecticut in 1848 enacted legislation almost identical to the New York statute of the same year.35/ Illinois adopted similar legislation in 1849,36/ California in 1850,37/ and Maryland in 1852.38/ Missouri adopted

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1863, Mich. Laws, No. 240, p. 421; Act of Feb. 23, 1873, Mich. Laws, No. 13, p. 11; Act of Feb. 20, 1873, Mich. Laws, No. 14, p. 12; Act of Mar. 14, 1873, Mich. Laws, No. 28, p. 27; Act of Apr. 27, 1875, Mich. Laws, No. 129, p. 157, Act of Apr. 28, 1875, Mich. Laws, No. 149, p. 180.

35/ Act of June 24, 1848, Conn. Laws, c. 84, p. 74. Amendments of limited significance: Act of June 22, 1849, Conn. Laws, c. 6, p. 7; Act of July 1, 1853, Conn. Laws, c. 25, p. 74; Act of June 23, 1860, Conn. Laws, c. 66, p. 52. The Act of May 1, 1883, Conn. Laws, c. 119, p. 302, required messenger delivery of telegrams within one mile of the station upon prepayment of a delivery charge.

36/ Act of Feb. 9, 1849, Ill. Laws, p. 188. The 1849 legislation was extended to all telegraph entities by Act of Mar. 19, 1867, Ill. Laws, p. 168.

37/ Act of Apr. 22, 1850, Cal. Laws, c. 128, p. 347, §§ 146-55. The 1850 legislation was amended in minor respects by Act of Apr. 4, 1861, Cal. Laws, c. 104, p. 84; Act of May 14, 1861, Cal. Laws, c. 375, p. 380; Act of Apr. 18, 1862, Cal. Laws, c. 262, p. 288; Act of Mar. 24, 1864, Cal. Laws, 1863-64, c. 233, p. 232. The California Civil Code of 1871 contained a requirement that: "Every telegraph corporation must fix uniform rates of charges proportionate to the number of miles, which must be uniform throughout the State, and publish them, by posting such rates at each of their offices . . . ." (§ 542). This provision was repealed Mar. 30, 1874, Code Amendments, 1873-74, p. 216.

Specific incorporation statutes sometimes granted exclusive rights-of-way. Act of May 3, 1852, Cal. Laws, c. 97, p. 169; Act of Mar. 18, 1858, Cal. Laws, c. 93, p. 73; Acts of Apr. 27, 1863, c. 433 & 434, pp. 706 & 707.

38/ Act of May 31, 1852, Md. Laws, c. 369. The legislation was replaced by Act of Mar. 30, 1868, Md. Laws, c. 471, p. 911.

substantially similar legislation in 1851, but did not provide for the general incorporation of telegraph companies.[39/]

C. Other Legislation With a Franchise Orientation

In 1847, Kentucky authorized persons possessing the necessary patent rights to construct telegraph lines on public highways; the next year construction was authorized across private lands upon payment of compensation to the owners.[40/] The legislature expressly reserved the right to regulate telegraph rates in the future, and stipulated that all messages "shall be sent in the regular order in which they are presented to the office or agent." An 1852 statute imposed a penalty if a telegraph agent, "from corrupt or improper motives or willful negligence, shall withhold the transmission of messages . . . for which the customary charges have been paid."[41/]

39/ Act of Feb. 22, 1851, Mo. Laws, 1850, p. 285. A substantial reenactment as ch. 156 of Mo. Rev. Stat. (1855) added a requirement of delivery of telegrams to persons within the town or within one mile of the station and posting by mail to those more distant. Incorporation of telegraph companies under a general statute was authorized by Mo. Gen. Stat. ch. 65 (1866), which included a number of additional features: § 2 referred to "reasonable charges"; § 7 prohibited contracts wth landowners excluding other lines; § 10 required the forwarding of messages via other lines; § 11 imposed a duty to provide information on anticipated delays; § 12 imposed special liability for various improprieties; and § 16 authorized consolidations.

40/ Act of Feb. 27, 1847, Ky. Laws, c. 382, p. 34; Act of Feb. 26, 1848, Ky. Laws, 1847, c. 357, p. 30. *See also* Act of Mar. 1, 1848, Ky. Laws, c. 513, p. 65, providing for specific incorporation of a telegraph company and imposing several regulatory provisions including a restriction on rates.

41/ Ky. Rev. Stat., art. 14, § 6, p. 261 (1852), reeneacted as Ky. Gen. Stat., ch. 29, art. 14, § 10 (1873).

Louisiana in 1848 authorized persons to construct telegraph lines on public roads, and over private lands upon payment of compensation;[42] a separate enactment made it unlawful for telegraph personnel to

> "refuse or omit to send or deliver any dispatch or message on which the charges or fees have been paid [or tendered;] or cause or direct to be detained or delayed, such dispatch or message, in order to give precedence to a message or dispatch subsequently brought to the office; . . . or . . . in any way [to] give precedence of time in sending or delivering any dispatch or message . . . over any dispatch or message previously offered for transmission. . . ."[43]

Legislation in 1853 and 1855 continued the authorization to use public and private lands and required telegraph companies "to transmit all communications, which are not immoral or contrary to law or public policy, . . . in the order in which" they are presented.[44]

In 1848 the Wisconsin Territory authorized persons with the necessary patent rights to construct telegraph lines along public roads and over private lands with the consent of

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42/ Act of Mar. 10, 1848, La. Laws, No. 52, p. 33.

43/ Act of Dec. 20, 1848, La. Laws, No. 74, p. 49 (Extra Session).

44/ Act of Apr. 22, 1853, La. Laws, No. 143, p. 104; Act of Feb. 28, 1855, La. Laws, No. 38, p. 32; Act of Mar. 12, 1855, La. Laws, No. 105, p. 109.

the owners. Transmissions were to "have precedence in the order in which they are received."45/ The territorial legislation was retained when Wisconsin became a state, and in 1851 incorporation of telegraph companies under general legislation was authorized.46/

Massachusetts in 1849 authorized telegraph companies to use public roads subject to local regulation and payment of damages to owners of adjacent properties. It also adopted a provision patterned on section 11 of the 1848 New York legislation, requiring telegraph companies to transmit messages "faithfully and impartially," upon payment of their usual charges, from and for both individuals and other telegraph lines.47/

45/ Act of Mar. 11, 1848, Wis. Terr. Laws, p. 257.

46/ Act of Feb. 21, 1851, Wis. Laws, c. 92, p. 66. The 1848 and 1851 legislation are included in Wis. Rev. Stat. ch. 76, 77 (1858). The same provisions were carried forward as ch. 74 of Wis. Rev. Stat. (1871). In 1878, two new sections were added: Telegraph companies were to "charge reasonable tolls for the transmission and delivery of messages," and were prohibited from giving an "unlawful preference in the sending, transmitting or receiving of telegraph dispatches." Wis. Rev. Stat. §§ 1778, 4557 (1878).

47/ Act of Apr. 9, 1849, Mass. Laws, c. 93, p. 61, supplemented by Act of May 23, 1851, Mass. Laws, c. 247, p. 739, and codified as Mass. Gen. Stat., ch. 64 (1860). By Act of June 1, 1867, Mass. Laws, c. 348, p. 743, telegraph companies were required to "receive, compute and transmit dispatches received at their offices from other telegraph companies, or by mail at the same rates of charges as for dispatches received from individuals, in person, at the same

[Footnote continued next page]

The same year Pennsylvania required telegraph companies "to forward and receive over their own lines, all messages that may be offered for transmission, by individuals or incorporated companies," upon tender of the usual fee.[48] Other regulatory provisions were included in specific legislation incorporating particular telegraph companies, which, in addition, conferred authorizations to use public and private lands.[49]

Iowa in 1851 authorized telegraph operations on public and private lands and imposed the obligation to receive dispatches from other telegraph lines and "transmit same with

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[Footnote continued from preceding page]

offices, bearing the date of the day and the place of the office where the same is received." See also Act of June 5, 1868, Mass. Laws, c. 310, p.227 (regulation of telegraph securities).

48/ Act of Mar. 29, 1849, Pa. Laws, p. 263.

49/ See, e.g., Act of Apr. 11, 1848, Pa. Laws, No. 378, p. 544; Act of Apr. 8, 1853, Pa. Laws, No. 228, p. 348; Act of Mar. 9, 1855, Pa. Laws, 1856, No. 616, p. 627 (Appendix); Act of Apr. 10, 1848, Pa. Laws, 1857, No. 707, p. 689 (Appendix); Act of Mar. 12, 1849, Pa. Laws, 1857, No. 710, p. 695 (Appendix). The enactment last cited provided that dividends in excess of 12% per year were to be paid to the state.

Specific incorporation continued until, pursuant to a constitutional amendment in 1874 (Art. XVI, sec. 12), a general incorporation statute was included as § 33 of the Act of Apr. 29, 1874, Pa. Laws, No. 32, p. 73. The same statute imposed a duty to transmit impartially for individuals and for other telegraph companies, and forbade extra charges for telegram delivery.

fidelity and without unreasonable delay." In addition, erroneous transmissions were made actionable and telegraph entities were made liable "for all damages resulting from a failure to perform any other duties required by law."50/

New Jersey in 1853 authorized the general incorporation of telegraph companies and the use of public roads with local consent. The statute included provisions requiring the free transmission of messages for public officials; the maintenance of public offices, at least one for every 40 miles of line; and the transmission of messages of private persons at or below rates stipulated in the statute.51/ This was the only early statute of general applicability explicitly regulating telegraph rates.

D. Additional Early Telegraph Legislation

A number of states passed legislation intended to facilitate telegraph construction without concurrently imposing

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50/ Iowa Code, 1851, §§ 780-85. The provisions were carried forward as §§ 1348-53 of the 1860 Revision and §§ 1324-29 of the 1873 Code.

51/ Act of Mar. 5, 1853, N. J. Laws, c. 122, p. 304. Incorporation by specific statute continued nonetheless. *See, e.g.*, Act of Mar. 15, 1861, N.J. Laws, c. 174, p. 518, including a proviso that rates "shall not exceed those charged by the other companies now in operation in this state." The 1853 statute was amended by Act of Mar. 28, 1966, N.J. Laws, c. 356, p. 814, and restated in the Revision of 1877 (pp. 1174-76).